

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SECOND APPEAL No. 129 of 1981

For Approval and Signature:

Hon'ble MISS JUSTICE R.M. DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy of the judgement? : NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO
5. Whether it is to be circulated to the Civil Judge? : NO

HEIRS OF IBRAHIM S HAJI-SULEMAN EXAPJI KETHDIWALA

Versus

HEIRS OF MARIAMBIBI AMINA MUSA HAJI

Appearance:

MR DD VYAS for Petitioners

MR AVINASH K MANKAD for Respondent No. 1

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 06/10/2000

ORAL JUDGEMENT

This is an appeal preferred by the defendants in Regular Civil Suit No. 118 of 1977 against the judgment and order dated 27th October, 1980 passed by the learned Assistant Judge, Valsad in Regular Civil Appeal No. 4 of 1980. The respondent herein was the plaintiff in the

said suit. Pending this appeal, the plaintiff has passed away and her heirs have been brought on the records of the matter.

The suit arises of the claim made by the plaintiff as a beneficiary of the Wakf made by one Ibrahim Saleh Haji, uncle of the plaintiff. The said Ibrahim Saleh Haji was the son of one Saleh Haji and had settled at Prim Rose in South Africa. The said Ibrahim Saleh Haji had a property situated at Mohmad Ali Street, Mumbai, worth Rs. 75,000/=. By a Wakfnama dated 3rd July, 1937, the said property was settled as a Wakf-Alal-Aulad for the purposes mentioned in the Wakfnama. Under the said Wakfnama, the net income from the said property was required to be divided into three parts. The first part of the net income was to be appropriated in the manner referred to in Clause-8 of the Wakfnama. The second part of the net income was required to be divided into nine equal parts to be applied for maintenance and for the benefit of the nine persons mentioned in Clause-10 of the Wakfnama. The said nine persons included father of the Wakif - Ibrahim Saleh Haji, his mother; two of his daughters born to his wife Teresa who had embraced Christianity; his four brothers and his wife Hawabibi. Amongst four brothers was one Suleman Saleh Haji, the father of the plaintiff. Clause-12 of the Wakfnama provided that in the event of the Wakif leaving a male child surviving him, the third part of the net income should be divided into nine equal parts and shall apply -one of such equal parts for the maintenance and benefit of each of the nine persons mentioned in Clause-10 referred to hereinabove. It further provided that, 'after the death of each of the said respective nine persons, or in the event of any of the said persons predeceasing the Wakif; from and after the death of the Wakif, the Muttawalli shall apply the said 1/9th equal part allocated to the said deceased person for the benefit of poor members of the family of the said Saleh Yusuf Haji in such manner as he may in his absolute discretion thinks fit.'

Under the said Wakfnama, the Wakif was appointed to be the Muttawalli. From and after his death, the seven persons named in Clause 2 of the Wakfnama were appointed to be the first Muttawallis. The plaintiff instituted the Regular Civil Suit No. 118 of 1977 in the Court of learned Civil Judge [Sr. Division] and claimed that she was the daughter of Suleman Saleh Haji; one of the brothers of the Wakif named in Clause-9 of the Wakfnama; that her father Suleman Saleh Haji was residing in Scotland and had given power to his brother Ismail

Saleh Haji to collect the benefit of the Wakf under the said Wakfnama. The said Sulemann Saleh Haji had died in the year 1973. The plaintiff claimed that she being the daughter of Suleman Saleh Haji, was one of the beneficiaries of the Wakf and was entitled to maintenance from the income of the Wakf, in accordance with the provisions made in Clause 12 of the Wakfnama. Neither the constituted attorney Ismail Saleh Haji gave accounts for the benefit received by him on behalf of late Suleman Saleh Haji nor was she paid any maintenance from the third part of the net income which was earmarked for the benefit of the family of late Saleh Yusuf Haji [the grand father of the Plaintiff]. The suit was contested by the defendants Muttawallis by filing written statement at Exh. 12. The fact of the Wakf or the provisions made therein were not in dispute. However, the suit was contested on the grounds of misjoinder of causes of action and lack of jurisdiction of Court to entertain and try the suit. The learned trial Judge dismissed the suit. Feeling aggrieved, the plaintiff preferred Regular Civil Appeal No. 4 of 1980 which was allowed on 27th October, 1980 by the learned District Judge, Valsad. The learned District Judge rejected the claim of the plaintiff for rendition of accounts and share from the net income of the Wakf property prior to the death of her father Suleman Saleh Haji. However, the defendants were directed to render true accounts to the plaintiff and to pay the respective share by way of help as per the terms and conditions of Wakfnama. Feeling aggrieved, the defendants have preferred the present appeal.

Mr. Vyas has relied upon Section 55 of the Wakf Act, 1954 and has submitted that the suit in the present nature at the hands of the plaintiff was not maintainable and the suit is required to be dismissed on that ground alone. Section 55 of the Wakf Act, 1954 as it stood prior to its amendment by the Act of 1969 of 1984 reads as under :-

55. (1) A Suit to obtain any of the reliefs mentioned in section 92 of the Code of Civil Procedure, 1908, relating to any wakf may, notwithstanding anything to the contrary contained in that section, be instituted by the Board without obtaining the consent referred to therein.

(2) No suit to obtain any of the reliefs referred to in section 92 of the Code of Civil Procedure, 1908, relating to any wakf shall be

instituted by any person or authority other than the Board without the consent in writing of the Board and for the institution of any such suit, it shall not be necessary to obtain the consent referred to in that section, notwithstanding anything contained therein.

Provided that nothing in this sub-section shall apply in relation to any such suit against the Board.'

Mr. Vyas has submitted that any reliefs mentioned in Section 92 of the Code of Civil Procedure, 1908 in relation to any Wakf, a suit can be instituted either by the Wakf Board or with the consent of the Board. In the present case, neither the suit has been instituted by the Board nor the plaintiff has obtained the consent of the Board. The relief for rendition of the accounts and the distribution of net income of the Wakf both are covered by the reliefs mentioned in Section 92 of the Code of Civil Procedure ie., under Clauses (d) and (e) read with Clause (h) of the sub-section 1 thereof. The above referred clauses of Section 92 (1) of the Code reads as under :-

`92. Public charities - (1) In the case of any alleged breach of any express or constructive trust created for public purposes of a charitable or religious nature, or where the direction of the Court is deemed necessary for the administration of any such trust, the Advocate General, or two or more persons having an interest in the trust and having obtained the leave of the Court, may institute a suit, whether contentious or not, in the principal Civil Court, or original jurisdiction or in any other Court empowered in that behalf by the State Government within the local limits of whose jurisdiction the whole or any part of the subject matter of the trust is situate to obtain a decree -

- (a) to (c) xx xx xx xx xx
- (d) directing accounts and inquiries;
- (e) declaring what proportion of the trust property or of the interest therein shall be allocated to any particular object of the trust;
- (g) xx xx xx xx xx xx
- (h) granting such further or other relief as

the nature of the case may require.'

Upon reading Section 55 of the Wakf Act, 1954 [prevalent at the relevant time] and the Code, it is apparent that the reliefs prayed for by the plaintiff would be covered by the reliefs mentioned in Sec. 92 of the Code. Section 92 of the Code leaves no doubt that in respect of the reliefs claimed by the plaintiff, the suit against the muttawallis could not have been instituted without obtaining the consent of the Board. It is indisputable that neither the suit has been instituted by the Board nor has it been instituted with the consent of the Board. In such set of facts, this Court in the matter of Kazi Jumma Tar Mullah [ILR (1972) Guj. 817] has held that, 'it is therefore clear that in view of the provisions contained in Section 55 that a suit to obtain any of the reliefs referred to in Section 92 of the Code of Civil Procedure, 1908 by any person or authority other than the Board is not competent without the consent of the Board.' In the present case, as referred to hereinabove, the suit instituted by the plaintiff without the consent of the Board was not competent. It is indisputable that the case did not fall within the proviso to sub-section 2 of Section 55.

In view of the above discussion, I hold that the suit by the plaintiff was wholly misconceived and was not competent. The appeal is allowed. The judgment and order dated 27th October, 1980 of the learned Asstt. Judge, Valsad in Regular Civil Appeal No. 4 of 1980 is quashed and set-aside. The suit is dismissed. The parties shall bear their own costs.

Prakash*